IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 23 OF 2002

Man Bahadur
s/o Karbir Singh,
r/o V-Tegu, Behar,
P.O. Bhunter, Dist.Kullu,
Himachal Pradesh,
(presently lodged at
Central Jail, Aguada,
Sinquerim, Bardez-Goa.) ... Appellant.

versus

State of Goa,
as represented by
Officer-in-charge,
ANC Police Station,
Police HQ, Panaji-Goa. ... Respondent.

Mr. Nitin Sardessai, Advocate under Legal Aid Scheme.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: P. V. HARDAS, J.

DATED: 10TH JULY, 2003.

ORAL JUDGMENT

The Appellant/Accused being aggrieved by his conviction for an offence punishable under Section 20(b)(ii) and Section 20(b)(c) of the N.D.P.S. Act, 1985 and sentence of Rigorous Imprisonment for 10 years and payment of fine of Rs.1,00,000/- in default

S.I. for 1 year, passed by the Special Judge, N.D.P.S. Court, Mapusa, by Judgment dated 5th January, 2002, in Special Criminal Case No.29/2000, has filed the present Appeal challenging the aforesaid conviction and sentence.

2. The facts as are necessary for the decision of the Appeal are set out hereunder:-

P.W.4, Rajendra Prabhudessai, was attached as P.S.I. to the Anti Narcotic Cell, Panaji, in March, 2000. On 26th March, 2000, at about 10 p.m., he received specific and reliable information that one person from Manali, aged around 30 years, strong built, short in height, of fair complexion would come in a private bus from Pune at Mapusa taxi stand with a consignment of charas on 27th March, 2000. On receipt of the said information, P.W.4, P.S.I. Rajendra Prabhudessai, reduced to writing the said information and a copy thereof was handed over to P.W.6, Jaspal Singh, Assistant Superintendent of Police. Exh.15 colly. is the said information reduced into writing and which was received by P.W.6, Jaspal Singh. P.W.4., P.S.I. Rajendra Prabhudessai, then secured the presence of two panchas namely P.W.3, Uday Shirodkar, and one Nitin Dhond. He informed the panchas regarding the information which he had

received and also informed the panchas that a copy of the said information was handed over to P.W.6, Jaspal Singh. The panchas were introduced to the Members of the raiding party which consisted of P.W.6, Jaspal Singh, Assistant Superintendent of Police, P.W.5, Uday Naik, P.S.I. Shaikh Salim, Head Constable Shaikh Sallya and Head Constable Gurudas Naik.

3. The raiding party consisting of the Police Officers and the two panchas then left the Anti Narcotic Cell Police Station at 4.15 a.m. on 27th March, 2000, in private vehicle towards Mapusa taxi stand. P.W.4, P.S.I. Rajendra Prabhudessai, carried with him a kit box containing sealing, weighing, packing materials, torches etc.. The raiding party reached Mapusa at about 4.35 a.m. and parked their vehicles near the taxi stand, keeping a watch on the buses arriving from Pune. P.W.4, P.S.I. Rajendra Prabhudessai, learnt that one bus from Pune had been delayed due to break down of the vehicle on the way and, therefore, the Members of the raiding party kept a watch on the arrival of the buses from Pune. At about 1.15 p.m., P.W.4, Rajendra Prabhudessai, saw one bus arriving from Pune and a person whose description matched with the description received by P.W.4, P.S.I. Rajendra Prabhudessai, alighting from the bus. The said person was having a bag slung on his shoulder

which was blue and black in colour. The Members of the raiding party immediately surrounded the said person and P.W.4, P.S.I. Rajendra Prabhudessai, introduced himself to the said person, who disclosed his name as Man Bahadur, son of Karbir Singh, identified during the trial as Accused. P.W.4, P.S.I. Rajendra Prabhudessai, then introduced the Members of the raiding party including the panchas and informed the Accused that P.W.4, P.S.I. Rajendra Prabhudessai, had received specific and reliable information that the Accused was carrying a consignment of charas and, therefore, he wanted to take search of the Accused. P.W.4, P.S.I. Rajendra Prabhudessai, informed the Accused regarding his right to be searched before a Gazetted Officer or a Magistrate but the Accused declined the offer. The Accused was also informed that he had a right to take the search of the Members of the raiding party including the panchas but the Accused again declined the offer. P.W.4, P.S.I. Rajendra Prabhudessai, then asked the Accused to hand over the shoulder bag which he was carrying on his person. On opening the zipper, P.W.4, P.S.I. Rajendra Prabhudessai, found one white colour polythene bag. On opening the said polythene bag, he found black colour substance of different sizes and shapes wrapped individually in a transparent cellophene paper. On examining the substance, P.W.4,

P.S.I. Rajendra Prabhudessai, informed the Members of the raiding party that he suspected the said substance to be charas. The said polythene bag together with the substance was weighed and it was found to weigh 1.110 kilos. The said polythene bag together with the substance was put in an envelope which was packed and sealed with 7 seals of Anti Narcotic Cell Panaji Goa-4 with Ashoka Emblem. The signature of P.W.4, P.S.I. Rajendra Prabhudessai and the panch witnesses was obtained. However, the Accused refused to sign the same. In the further search of the said bag, one cellular phone with charger, sun glasses, 9 C.Ds, one driving licence and some clothes were found. The said articles were repacked in the bag and a label was affixed to the said bag bearing the signatures of both the panchas and P.W.4, P.S.I. Rajendra Prabhudessai. The Accused, however, refused to sign the said label. On the personal search of the Accused nothing incriminating was found on his person except cash of Rs.626/-. The Accused was then informed that possession of charas was an offence under the N.D.P.S. Act and was asked to produce any licence of the possession of the said drugs. He was explained the grounds of arrest and was taken in custody. The Accused was again informed that he had a right to search the Members of the raiding party but the Accused declined the said offer. A panchanama of the

entire sequence of events was drawn and the panchanama is at Exh.10. The Seizure Report is at Exh.11. A copy of the panchanama and the Seizure Report was handed over to the Accused at the spot.

4. On returninng to the Police Station, P.W.4, P.S.I. Rajendra Prabhudessai, registered an offence vide Crime No.13/2000 against the Accused on the basis of his complaint at Exh.13. A specimen sealed letter addressed to the Director of Food and Drugs Administration at Exh.P.W.1/B was prepared and the muddemal articles, letter and the seal was handed over to P.I. Anti Narcotic Cell Police Station vide Exh.14. Vide Exh.16, intimation under Section 57 of the N.D.P.S. Act was given by P.W.4, P.S.I. Rajendra Prabhudessai.

5. On 28th March, 2000, P.W.5, P.S.I. Uday Naik, who was holding charge of P.I Anti Narcotic Cell Police Station sent one sealed envelope through Police Constable to the Office of the C.I.D. Crime Branch, Panaji, for onward submission to the Director, Food and Drugs Administration, Panaji. On the same day, the sealed packets were received by P.W.2, Manohar D. Joshi, who acknowledged on the duplicate copy of the letter at Exh.P.W.2/A. He kept the sealed cover in his steel cupboard under lock and key. P.W.2, Manohar

D. Joshi, forwarded the sealed packets to the Director, Food and Drugs Administration, Panaji, on 29th March, 2000, through Head Constable, Buckle No.1836 for examination. P.W.1, Mahesh M. Kaissare, received the sealed brown colour envelope in the laboratory on 29th March, 2000, with the covering letter at Exh.P.W.1/A. He also received the specimen sealed impresssions along with the letter at Exh.P.W.1/B. On comparison of the seals, he found the seals tallying with the specimen seal impressions. On 11th May, 2000, he took a representative sample of 275 grams of the substance comprising of 76 samples at random. On examination, he found that the substance analysed by him tested positive for charas. The Report of P.W.1, Mahesh M. Kaissare, is at Exh.P.W.1/C. On completion of the investigation, a charge-sheet against the Appellant/Accused came to be filed.

6. The learned Special Judge, N.D.P.S. Court, Mapusa, vide Exh.4, framed a charge against the Appellant/Accused for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act. The Appellant/Accused pleaded not guilty and claimed to be tried. The prosecution in support of its case examined 6 witnesses.

7. P.W.3, Uday Shirodkar, a panch, states that he was called to the Police Station around midnight and at the Police Station, he was told by P.W.4, P.S.I. Rajendra Prabhudessai, of having received information of a person who was to deliver a consignment of charas. The reliable information received by P.W.4, P.S.I. Rajendra Prabhudessai, was conveyed to him and the other panch and the Members of the raiding party. P.W.4, P.S.I. Rajendra Prabhudessai, also informed him that the information received by him was reduced into writing and a copy was sent to his superiors. Thereafter, after 4 in the morning, the Members of the raiding party left in private vehicles. The raiding party had carried with them weighing scales, weights and other articles. P.W.4, P.S.I. Rajendra Prabhudessai, was carrying the seal of Anti Narcotic Cell Panaji Goa-4 with Ashoka Emblem. The raiding party reached Mapusa at about 4.30 a.m. and parked their vehicles near the taxi stand. At about 1.15 p.m., a private bus came from Pune and they noticed one person alighting from the bus whose appearance matched the description given by P.W.4, P.S.I. Rajendra Prabhudessai. The said person was surrounded and P.W.4, P.S.I. Rajendra Prabhudessai, identified himself to the said person and told the said person that he wanted to take his search. The said person disclosed his name as Man

Bahadur. P.W.4, P.S.I. Rajendra Prabhudessai, introduced the Members of the raiding party and P.W.4, P.S.I. Rajendra Prabhudessai, had informed the Accused that if he required, his search could be taken either before a Gazetted Officer or a Magistrate. The said person, identified as the Accused in the trial, declined the offer. P.W.4, P.S.I. Rajendra Prabhudessai, also offered the search of the raiding party but the Accused again declined. P.W.4, P.S.I. Rajendra Prabhudessai, then asked the Accused to hand over the bag which was being carried by the Accused on his shoulder. On opening the main compartment of the bag, P.W.4, P.S.I. Rajendra Prabhudessai, found a plastic bag and on opening the said bag, blackish colour substance in the nature of bars/sticks of different sizes with each of such stick individually wrapped in plastic cellophene paper was found. On observing the said substance, P.W.4, P.S.I. Rajendra Prabhudessai, stated that he suspected the substance to be charas. The substance together with the polythene bag was weighed and it was found to weigh 1.1 kg. The substance with the polythene bag was packed in an envelope and sealed. The signature of the panchas and P.W.4, P.S.I. Rajendra Prabhudessai, was obtained. P.W.3, Uday Shirodkar, has further stated that apart from the substance certain other articles like mobile phone, pair of sun glasses, cash

of Rs.626/-, a waist belt, driving licence and clothes of the Accused were found in the said bag. All the articles were repacked in the bag and the bag was sealed. P.W.4, P.S.I. Rajendra Prabhudessai, asked the Accused if he had any legal documents of possession of charas but the Accused could not produce any documents. Panchanama of the sequence of events was drawn and was signed by the panchas.

8. In the cross-examination, P.W.3, Uday Shirodkar, has admitted that he was running a grocery shop near Azad Maidan, Panaji, since last about 12 years. He has further stated that one Police Constable had come to his shop to call him at the Police Station. He has further admitted that he had seen the seal of Anti Narcotic Cell which was carried by P.W.4, P.S.I. Rajendra Prabhudessai. He has further admitted that P.W.4, P.S.I. Rajendra Prabhudessai, was talking to the Accused in Hindi when he made an offer to be searched before a Gazetted Officer or a Magistrate. He has stated that he, however, recalls the Accused saying "Nahi Mangata" He has further admitted that after the process of raid was over, he went to the house of his relations at Mapusa. He has denied the suggestion that the process of packing and sealing was not done at the spot. He has further stated that he had not gone to the Police

Station at any time after the panchanama.

9. P.W.4, P.S.I. Rajendra Prabhudessai, states in his cross-examination that his informant had personally given him the reliable information while he was in the Office of Anti Narcotic Cell Police Station. He has further admitted that the information did not reveal the name of the person but only his description and also did not reveal the number of the bus in which the Accused was to come to Goa from Pune. The learned Judge has made a reference to the station diary entered which shows that P.W.4, P.S.I. Rajendra Prabhudessai, had left the Police Station to hand over the copy of the information to P.W.6. Jaspal Singh. He has admitted that the other panch Nitin Dhond was known to him since he was a panch in an earlier case under the N.D.P.S. Act. He has also admitted that Nitin Dhond was a panch in two N.D.P.S. cases where he was the Investigating Officer. He has further admitted that he was not knowing P.W.3, Uday Shirodkar, prior to the panchanama. He has further admitted in the cross-examination that he had collected the seal of Anti Narcotic Cell Police Station from P.W.5, Uday Naik, since he was in charge of Police Station and he had returned the same after completing all the formalities including the registration of offence. He has further admitted that

he cannot recall the exact words used by him in Hindi while conveying the right to the Accused of being searched in the presence of a Gazetted officer or a Magistrate. He, however,recollects of having used "Raj Patrik adikari" for Gazetted Officers. He has also admitted that he has not reproduced the actual Hindi words either in the complaint or panchanama. In the further cross-examination, he has stated that P.W.5, P.S.I. Uday Naik, handed over the said seal of Anti Narcotic Cell Panaji Goa-4 by making an entry on 13th April, 2000 at 17.10 hours and he had handed over the seal back to P.W.5, P.S.I. Uday Naik, on the same day at 19.35 hours. He has further admitted that in his letter to P.I. at Exh.14, he has made a record that he was handing over the seal of Anti Narcotic Cell Panaji Goa-4 for safe custody. He has further admitted in the cross-examination "I have not taken back the seal after I handed it over to P.S.I. Uday Naik". The reference made by this witness to the date of handing over the seal on 13th February, 2000, is obviously an unintended slip.

10. Mr. Nitin Sardessai, learned Counsel appearing on behalf of the Appellant/Accused has urged before me that there is no evidence to show that the seal which P.W.4, P.S.I. Rajendra Prabhudessai, used, had in fact been deposited. According to him, the

evidence of P.W.5, P.S.I. Uday Naik, is extremely cryptic as P.W.5, P.S.I. Uday Naik, does not give the description of the seal which was deposited by P.W.4, P.S.I. Rajendra Prabhudessai after the raid. A reference may usefully be made to the letter at Exh.14 given by P.W.4, P.S.I. Rajendra Prabhudessai, while depositing the muddemal and the seal to the Police Inspector, Anti Narcotic Cell on 27th March, 2000. It is stated in the said letter "I am also handing seal of Anti Narcotic Cell Panaji Goa-4 with Ashoka Emblem for safe custody". Thus, merely because P.W.5, P.S.I. Uday Baik, has not given the description of the seal when the same was handed over along with the muddemal article, it cannot be presumed that the seal used by P.W.4, P.S.I. Rajendra Prabhudessai, was retained by him and deliberately a different seal was handed over to P.W.5, P.S.I. Uday Naik. The contents of the letter at Exh.14, which contained the description of the seal, are a clear pointer to the fact that the seal which was used by P.W.4, P.S.I. Rajendra Prabhudessai, at the time of raid was handed over to P.W.5, P.S.I. Uday Naik for safe custody.

11. Mr. Nitin Sardessai, learned Counsel appearing on behalf of the Appellant then urged before me that P.W.1, Mahesh M. Kaissare, has stated that the colour of the substance which he had examined was

dark brown in colour whereas P.W.3, Uday Shirodkar, the panch witness and P.W.4, P.S.I. Rajendra Prabhudessai, have referred to the substance as a blackish substance. According to me, not much importance can be attached to a minor discrepancy if at all it can be called a discrepancy. The dark brown substance has been described by P.W.3, Uday Shirodkar and P.W.4, P.S.I. Rajendra Prabhudessai, as a blackish colour substance. This discrepancy does not reflect that what was seized at the scene of the offence was not the same substance that was examined by P.W.1, Mahesh M. Kaissare.

12. Mr. Nitin Sardessai, learned Counsel appearing on behalf of the Appellant has then referred to the evidence of P.W.4, P.S.I. Rajendra Prabhudessai, in which he states that on opening the bag he found blackish coloured substance of different sizes and shapes wrapped individually in cellophene paper. Even in the panchanama, it is stated that blackish coloured substance in different sizes and shapes was found. P.W.3, Uday Shirodkar, states that the bag was opened by P.W.4, P.S.I. Rajendra Prabhudessai, and it was found to contain blackish coloured substance in the nature of bars/sticks of different sizes and each stick was individually wrapped in brown cellophene paper. P.W.1, Mahesh M.

Kaissare, states that on opening the envelope, he found 1.070 kgs. of a dark brown colour substance in the form of pieces of various shapes such as circular, rectangular, flat etc.. On the basis of this evidence, it is urged by the learned Counsel appearing on behalf of the Appellant that P.W.4, P.S.I. Rajendra Prabhudessai and P.W.1, Mahesh M. Kaissare, do not make any reference to finding of substance shaped like sticks in the bag of the Appellant/Accused. Thus, it is urged before me that this discrepancy would further enhance the probability of the tampering of the contraband that was seized. The evidence of P.W.4, P.S.I. Rajendra Prabhudessai, is to the effect that the contraband drug was in various sizes and shapes. This is also reflected in the panchanama. P.W.1, Mahesh M. Kaissare, has given a further description by saying that the contraband was in various sizes and shapes such as circular, rectangular, flat etc.. P.W.3, Uday Shirodkar, the panch witness no doubt states that the contraband was in the shape of bars/sticks. This minor discrepancy, according to me, would not be enough to conclude that there was a possibility of the sample being tampered with. The witnesses have referred to the contraband being in different sizes and shapes without specifying exactly that they were also in the form of sticks. If, the other evidence in relation to the sealing and

the safe custody is found to be credit worthy, mere error in the description of the size and shape or colour would not lead to an irresistible conclusion that the sample had been tampered with.

13. It is next urged before me by the learned Counsel appearing on behalf of the Appellant that the evidence tendered by the prosecution is most unsatisfactory regarding the safe custody of the drugs after their sealing and, therefore, the possibility that the packet being tampered with cannot be ruled out. P.W.4, P.S.I. Rajendra Prabhudessai, has stated that as per the letter at Exh.14, he had handed over the muddemal articles along with the seal to P.W.5, P.S.I. Uday Naik. P.W.5, P.S.I. Uday Naik, acknowledges to have received the muddemal and the seal from P.W.4, P.S.I. Rajendra Prabhudessai, and of having taken a relevant entry in the muddemal register. He further states that on the next day, he had sent one sealed envelope through Police Constable Buckle No.3838 for onward transmission to the Analyser. The evidence of P.W.2, Manohar D. Joshi, is clear that vide Exh.PW2/A, he had received sealed envelope containing 1.110 kgs, of charas from Police Constable Buckle No.3838 of Anti Narcotic Cell, Panaji. The evidence of P.W.2, Manohar D. Joshi, further establishes that on receipt of the said sealed

envelope, he had kept it under lock and key and then forwarded the same to the Director of Food and Drugs Administration for analysis. The evidence of P.W.1, Mahesh M. Kaissare and particularly his report at Exh.PW1/C, establishes that he had examined the sealed envelope bearing seven seals and on comparison of the seals with the specimen seals, he found that the seals tallied. Thus, the prosecution in this case has been able to establish that the muddemal which was received from P.W.4, P.S.I. Rajendra Prabhudessai, was sent for analysis and was ultimately analysed by P.W.1, Mahesh M. Kaissare. From the evidence, it emerges that P.W.4, P.S.I. Rajendra Prabhudessai, had deposited the seal and the seal was, therefore, not in his possession. Thus, according to me, there is no possibility of the seals being tampered with.

14. Mr. Nitin Sardessai learned Counsel appearing on behalf of the Appellant has placed reliance on a Division Bench Judgment of this Court in **Wessel Van Beelan** v. **State of Goa** reported in 1999 (5) Bom. C.R. 575. To urge before me that there must be very cogent and trustworthy evidence on the part of the prosecution that the contraband seized is the same which is ultimately analysed by the Junior Scientific Officer. The facts of the reported case are wholly inapplicable to the facts of the present

case. As in that case, the Division Bench had observed that the seal which was affixed continued to remain with the Investigating Officer till the sample was sent to the Analyst. In the present case, I have already held that the seal was promptly handed over by P.W.4, P.S.I. Rajendra Prabhudessai to P.W.5, P.S.I. Uday Naik, after the process of sealing was over. Therefore, in my respectful opinion, the facts of the reported case cannot be applied to the facts of the present case.

15. It is next urged that there is a total non compliance of Section 50 of the N.D.P.S. Act. It is urged before me that P.W.3, Uday Shirodkar, has admitted that P.W.4, P.S.I. Rajendra Prabhudessai, was talking to the Accused in Hindi when he made an offer of being searched before a Gazetted Officer or a Magistrate. P.W.3, Uday Shirodkar, was unable to reproduce the offer in Hindi. He has, however, stated that the Accused had declined the offer by saying "Nahi Mangata". It was then urged that the evidence of P.W.4, P.S.I. Rajendra Prabhudessai, also shows that the right of search was conveyed to the Accused in Hindi. P.W.4, P.S.I. Rajendra Prabhudessai, had stated that he was not in a position to recall the exact words used by him while conveying the right. Thus, therefore, it is urged that merely asking the

Accused whether he desires to be searched before a Gazetted Officer or a Magistrate cannot be treated as compliance of Section 50 of the N.D.P.S. Act.

16. Reliance is placed on a decision of the Single Judge of this Court in **Mohammad Ismail** v. **State of Maharashtra** reported in 2003(1) Mh.L.J. 623 in which the learned Single Judge of this Court held that where the Accused was given a notice there was a provision of taking his personal search in the presence of Executive Magistrate or Gazetted Officer and if he so desired arrangement can be made for the same. The learned Single Judge, therefore, held that merely asking the Accused whether he desired to be searched in the presence of a Gazetted Officer or a Magistrate was not in compliance of Section 50. In the present case, the evidence of P.W.4, P.S.I. Rajendra Prabhudessai, is clear that he told the Accused that he has a right to be searched before a Gazetted Officer or a Magistrate but the Accused declined. Similar statement is to be found in the panchanama at Exh.10. P.W.3, Uday Shirodkar, states that P.W.4, P.S.I. Rajendra Prabhudessai, had informed the Accused that if he required his search could be taken either before a Gazetted Officer or a Magistrate.

17. The Supreme Court in **Joseph Fernandez** v. **State of Goa** reported in (2000) 1 SCC 707 has held that there was substantial compliance with Section 50 in informing the suspect that if he wished, he may be searched before a Gazetted Officer or a Magistrate. That apart, there is clear evidence that the Accused was apprised of his right of being searched either before a Gazetted Officer or a Magistrate. Therefore, according to me, the mandate of Section 50 has been complied with.

18. After giving my anxious consideration to the material on record, I am of the opinion that the prosecution has established the offence against the Accused beyond reasonable doubt and as such, the Judgment convicting and sentencing the Appellant/Accused needs no interference.

19. In the result, therefore, Criminal Appeal No.23 of 2002 is dismissed. As the Appellant is in Jail, a copy of this Judgment be sent to the Appellant.

P. V. HARDAS, J.

RD.